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PETITION NOT PRINTED
IN THE

Supreme Court of the United States

October Term, 1960.

No. 185

AUGUSTINE BALDONADO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

Introduction.

Despite the attempt to persuade this Court that his discussion of the questions asked by this Court is objective, petitioner indulges in a subtle character assassination of Roy A. Gustafson, the District Attorney of Ventura County who prosecuted petitioner. In the text of the brief (and omitting the innuendoes from the appendices), petitioner obviously charges that Mr. Gustafson:

1. Made "extraordinary statements."

2. "[H]ailed the death verdict" of Elizabeth Duncan.

3. Made "vigorous and extensive arguments for imposition of the death penalty which were inten-

tionally given to the press and widely disseminated."

4. Made a "deliberate effort to interfere with petitioner's penalty hearing."

5. Is not a "sober, discreet and religious person."

6. Tried his case "outside of the courtroom."

7. Engaged in a "newspaper campaign."

8. Created a "prejudicial atmosphere."

9. Tried his case "in the mass media."

10. Engaged in "improper methods."

11. Participated in "inflammatory conduct."

12. "[C]arried on a brainwashing campaign to condition the local populace to his persuasion."

13. "[P]ropagandized on the main subject of this petitioner's jury trial."

14. Undertook "Madison Avenue packaging of the case."

15. "[C]arried out a deliberate press campaign to obtain the death penalty."

16. Participated in permitting "photographing the proceedings [of the Duncan trial] in derogation of Canon 35 of the Canons of Judicial Ethics."

Respondent asks this Court to decide this case on the record, not on the basis of the unfounded charges against Mr. Gustafson made by petitioner's counsel. Moreover, respondent respectfully submits that the gov-

erning authorities are (1) the Constitution of the United States, (2) its interpretation by the courts, and (3) the laws (statutes and judicial decisions) of California and not the opinions of sociologists, psychologists, attorneys, newspaper editors, law professors and others (as contained in Appendix C of Petitioner's Brief).

(It perhaps should be noted parenthetically that the record of Mr. Gustafson belies every charge made against him by petitioner. The following facts are common knowledge of which judicial notice may be taken: Mr. Gustafson has been admitted to the bar since 1942 and to the bar of this Court since 1945. After eight years of practice, during which he defended persons accused of crimes, he took office as the elected District Attorney of Ventura County in 1951. He resigned this year during the middle of his third term and returned to private practice. He is a Fellow of the American College of Trial Lawyers, an organization having an unusually high standard of ethics and which elected him to membership *after* the trial of this case. He has been a member and chairman of the California Law Revision Commission [appointed by the Governor of California, confirmed by unanimous vote of the Senate and elected chairman by the Commission members]. Elected by the lawyers to the Board of Governors of The State Bar of California in 1951 [to represent the counties of Ventura, Santa Barbara, San Luis Obispo, Monterey, Santa Cruz, San Benito

and San Mateo], he was elected Vice-President for 1953-54. He is rated "a" for legal ability in the Martindale-Hubbell Law Directory, the only approved general law list of the American Bar Association. He is the author of articles, notes and book reviews in 30 Southern California Law Review 1 [1956]; 44 California Law Review 815 [1956]; 43 California Law Review 163 [1955]; 28 California State Bar Journal 56 [1953]; 29 Minnesota Law Review 214 [1944]. He is the draftsman of much California legislation [including the separate "penalty trial" in capital cases used in the instant case and praised by the American Law Institute in the preliminary drafts of the Model Penal Code] and has lectured on legal subjects at Stanford University, University of Southern California, University of California and U. C. L. A. Respondent does not contend that these facts make it impossible for Mr. Gustafson to have been guilty of improper conduct, but respondent does contend that this Court should not determine what Mr. Gustafson said or did or intended to do by what was reported in newspapers or by what petitioner alleges as conclusions. Mr. Gustafson is at the very least entitled to the presumption that he did not engage in misconduct in the absence of competent evidence that he did. As will be pointed out, there is no such evidence in the record.)

ARGUMENT.

I.

Was Petitioner's Right to the Trial Guaranteed by the Due Process Clause of the XIV Amendment Violated in View of the Conduct of the District Attorney, the Resulting Publicity, and the Other Circumstances Under Which the Trial Was Held?

Respondent understands that the sole point posed by the Court's question is whether by holding petitioner's trial before a jury in Ventura County on April 6, 1959, California deprived petitioner of a fair trial. Petitioner claims that it was impossible for him to be fairly tried before a jury at that time and place because of the newspaper publicity regarding the case.

Petitioner murdered Olga Duncan on November 17, 1958. He was brought to trial nearly five months later for the sole purpose of having his penalty fixed, he having theretofore pleaded guilty to first degree murder. The sole question before the jury was whether petitioner should be imprisoned for life or executed. The jury determined that he should be executed.

Petitioner, in his appeal to the California Supreme Court, alleged that numerous errors occurred during the judicial proceedings against him. That court found that except for one evidence ruling which was nonprejudicial, no errors occurred. It unanimously affirmed the judgment. *People v. Baldonado,* 53 Cal. 2d 824, 350 P. 2d 115 (1960). Respondent understands that this Court's order on granting certiorari eliminated any ques-

tion of the propriety of the trial judge's rulings during the course of the judicial proceedings (except insofar as jurors with opinions were "permitted" to serve, a matter treated separately under the second question posed by this Court). Thus the issue is confined to whether facts and circumstances outside of the judicial proceedings and prior to the trial deprived petitioner of a fair trial. There is no showing that any fact or circumstance occurred outside the judicial proceeding except the publication of the newspaper articles which were submitted as exhibits to an application for change of venue. Consequently, the narrow issue is whether the pre-trial publications prevented the selection of a fair and impartial jury.

A. The Sole Question Concerning Newspaper Articles Is Their Effect on Persons Exposed to Them, Not Whether They Accurately Report the Facts.

Suppose a newspaper published a story that the judges of the county held a meeting and unanimously declared that they hoped and expected that every person called as a juror for petitioner's case would vote for the death penalty. No such meeting was held and no such statement made by any judge. Nevertheless, if the effect of reading the article was such that the reader thereafter could not fairly try petitioner, the fact that the story was wholly false would not make trial by such a person (as a juror) any less unfair.

In this connection it should be noted that the out-of-court conduct of the District Attorney is not properly in question here, nor was it in the courts below. When petitioner's co-defendant Moya made an application for change of venue on January 13, 1959, news-

papers were attached as exhibits. Petitioner made a similar application at the same time and incorporated by reference the exhibits offered by his co-defendant. The question before the judge was whether (assuming all prospective jurors would have read the articles) the effect of the articles on every reader would be that he would be unable to fairly try petitioner on the issue of penalty. Where an article purported to relate a statement by the District Attorney, the judge was not concerned with whether the District Attorney actually made such a statement or with whether it was true, but with whether the effect on every prospective juror was such that he would necessarily become and remain legally biased.[1] In arguing the motion for change of venue in the trial court, counsel for petitioner's co-defendant acknowledged this when he said: "And it doesn't make any difference whether the publications . . . were true or not." [Tr. of R., pp. 72-73.] Petitioner's counsel took no different position.

The District Attorney did not file an affidavit denying the making of those statements (among those attributed to him in the newspaper exhibits) which were in fact not made by him. The reason is simple. Whether he made any or all of the statements attribut-

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[1]The words "biased" and "prejudiced" as used throughout this brief refer to a state of mind wherein a person's opinions are so fixed that he is unable to decide an issue on the basis of evidence presented to him unaffected by the previously formed opinions. In California, as in almost all jurisdictions, a person is not "biased" or "prejudiced" simply because he has heard or read about a case or because he has formed opinions about the issues if, notwithstanding his opinions, he can decide the case solely on the evidence presented in court. To distinguish between one who has an opinion which does not disqualify him as a juror and one whose opinion is "fixed" and thus disqualifying, the latter is often referred to herein as "legally biased."

ed to him was not in issue. If a prospective juror read an article quoting the District Attorney as having said something which he actually did not say, the effect on the prospective juror would be no less if the District Attorney filed an affidavit in court denying that he made the statement.

Moreover, the out-of-court conduct of the District Attorney can not be proved by newspaper articles attached as exhibits to an affidavit supporting a motion for change of venue. The fact that a newspaper says that the District Attorney made a certain statement is not proof that the statement was made. It is the rankest kind of hearsay. The California Supreme Court recognized this fact and carefully used such phrases as "an article quoted the district attorney at length", and as "the district attorney was reported to have made" certain statements. The California Supreme Court noted that at oral argument "the district attorney denied making most of the statements attributed to him." The California Supreme Court, in other words, recognized, as did the trial court and counsel, that the purpose of the exhibits was to determine whether prospective jurors who might have read them would necessarily have become biased and not to determine whether what the articles said was true.

Respondent has treated this point at length because petitioner sought certiorari on the claim that the articles were proof of the facts stated therein and because this Court, in its order of June 27, 1960, seemed to accept this view when it asked whether "the conduct of the District Attorney" violated petitioner's right to a fair trial.

B. The Newspaper Publications Were Not Such as to Cause Every Person Who Read Them to Become Legally Biased.

Since there is nothing in the record to indicate that any particular juror actually did not act fairly and impartially, any conclusion that a juror did not so act must necessarily be based on the premise that because of the newspaper publications the juror *could not* (and therefore the juror *did not*) act fairly and impartially.

For convenience in discussing this point, respondent has divided the publications into two categories which will be separately discussed.

1. The Reported Facts of the Crime.

Olga Duncan, a pretty, young Santa Barbara nurse who was the wife of a Santa Barbara attorney, disappeared on November 17, 1958. She was pregnant and there soon began to be news stories about her disappearance. By the middle of December, interest in the case had spread beyond Santa Barbara County. Los Angeles newspapers carried stories about the matter and newspapers in Ventura County likewise did. At this time there was no indication that Ventura County had anything to do with the case.

Then on December 22, 1958, the newspapers reported that petitioner, awaiting sentence in Ventura County on another charge, confessed that he murdered Olga Duncan on November 17, 1958, and buried her in Ventura County. [Exs. 3, 10, 24, 30 to Affdvt.; Tr. of R., pp. 43, 45, 47.] On December 26, 1958, the newspapers reported that petitioner's co-defendant Moya also confessed the murder. [Exs. 18, 26, 34 to Affdvt.; Tr. of R., pp. 46-47.]

After the transcript of the grand jury hearing was filed, it became a public record, *People v. Darby*, 114 Cal. App. 2d 412, 250 P. 2d 743 (1952), and the newspapers quoted at length from the testimony including that given by petitioner as a witness.

It is here extremely important to note that the newspaper exhibits which are in the record in petitioner's case (as opposed to co-defendants Moya and Duncan) are very limited in number. They are only those which were submitted on January 13, 1959. [Tr. of R. p. 51.] Thus they do not include any accounts of the trial of co-defendant Duncan or any reported comments of the trial judge. Hence these matters are not discussed in this brief.

When petitioner's trial began on April 6,1959, penalty was the sole issue to be determined, petitioner having theretofore pleaded guilty to first degree murder. The first question before this Court is whether each and every person reading the newspaper articles relied upon by petitioner would necessarily be of such frame of mind that he could not fairly and impartially determine whether petitioner should suffer the death penalty or life imprisonment.

Respondent believes that the answer to the question can be supplied only by the subjective reactions of the members of this Court after reading the limited number of exhibits pertinent to petitioner's case.

If a member of this Court can read the articles without concluding that if he were to try the case, he would impose the death penalty on petitioner regardless of what the evidence might be, then petitioner's

right to a fair trial was not infringed.[2] This is so for the reason that nothing in the record indicates that any of the twelve jurors had any fixed opinion from any source as to what the penalty should be and nothing indicates that any juror was less capable of deciding the case on the evidence than a member of this Court would be. On the contrary, the jurors all declared that they would decide the case solely on the evidence and petitioner accepted these declarations because he did not challenge a single juror!

Respondent submits that a reading of the exhibits would not leave every reader in the frame of mind that petitioner should be executed regardless of whatever evidence might be presented in court.

2. *The Reported Remarks of the District Attorney.*

The District Attorney is quoted in the Ventura County Star-Free Press of December 22, 1958, and the Oxnard Press Courier of December 24, 1958, as being in favor of the retention of the death penalty in California. [Exs. 3, 4 to Affdvt.; Tr. of R. p. 43.] Petitioner claims that the article was a demand by the District Attorney that petitioner be executed and that the story necessarily would influence every reader against petitioner.

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[2]The converse is not true. If a member of this Court upon reading the newspapers feels that he would thereafter be unable to fairly try the case, it does not mean that all persons would have similar reactions. Before concluding that petitioner was deprived of a fair trial, it would be necessary to find that (1) all persons would necessarily be affected in the same manner as the Justice, (2) at least one juror read the matter deemed offensive, (3) the reaction continued to exist from the time of reading to the time of trial, (4) the juror in stating that he could try the case fairly was incorrect in his conclusion and (5) petitioner may raise the point in this Court even though at the trial he did not challenge any jurors on the ground of bias.

In the first place, the statement on its face shows that it was concerned with contemplated legislation, not with the trial of petitioner's case. That the reporter of the Ventura County Star-Free Press considered it as such is illustrated by the opening sentence of the story: "District Attorney Roy Gustafson saw the Duncan murder as reason for a continuation of California's death penalty." The headline writer saw it in the same light because the headline reads: "D. A. Urges Death Term in Killings." There was only *one* killing involved in the instant case. The plural word "Killings" clearly indicates that the statement related to the retention of capital punishment for murders in general and not for this particular murder alone. There was nothing unusual in the District Attorney's public statement on this subject because he had often been quoted in his appearances before the California Legislature in opposition to the repeal of capital punishment. In fact, Coronet magazine (Jan. 1960, p. 136) described him as "one of the nation's most outspoken advocates of capital punishment."

In the second place, when this statement was published petitioner was not under arrest for, nor charged with, the murder. His name was not mentioned in the statement. It was yet to be determined who would be charged with being the perpetrators of the murder much less who, if anyone, would ultimately be convicted thereof.

Certain it is that not every person who read the statement of the District Attorney was persuaded to his point of view regarding capital punishment. The only reactions received by the newspaper to the published statement were protests against it as evidenced by

published letters to the editor on December 24, 1958, December 30, 1958, and January 3, 1959. [Tr. of R. pp. 17-21.] Moreover, 13 out of the 61 prospective jurors examined were excused on challenges for cause because of their conscientious scruples against the death penalty. Again, it is obvious that if the 13 persons read the statement of the District Attorney, they were not in the least persuaded by it.

An article of December 30, 1958, in the Ventura County Star-Free Press set forth what purported to be the District Attorney's reasons why he would seek the death penalty as to petitioner and his co-defendants. (The fact that the article was not true is indicated by the issue of the same newspaper on February 24, 1959 [Exh. A-14 to Declar.; Tr. of R. (Moya Case), p. 66], reporting that the District Attorney had not even then stated whether he would seek the death penalty for the co-defendant then being tried.) However, respondent acknowledges that the truth or falsity of the publication is not in issue. The question is whether those who read the article would become so biased that they could not fairly try the petitioner.

The answer seems evident. In any capital case every prospective juror necessarily knows before the trial commences whether the prosecuting attorney will seek the death penalty. This is apparent from the examination of the jurors as to their views with respect to capital punishment. In petitioner's case, where the only issue was punishment, there would have been no trial at all if the District Attorney had not been seeking a death verdict because under California law the punishment would be life imprisonment if the District Attorney agreed to it. Cal. Penal Code, §1192.3.

Petitioner seeks to leave the impression that purported comments from the District Attorney of Ventura County were more damaging than they otherwise would have been because Ventura County is a small, rural area (and presumably everyone knew the prosecutor). This Court can take judicial notice of the 1960 preliminary census figures. They show that of the more than 3,000 counties in the United States, Ventura County ranks in the upper 5% in population. Moreover, of the 34 prospective jurors asked by petitioner's counsel as to whether they knew the District Attorney, only six replied in the affirmative. [Tr. of R. pp. 104, 128, 130, 162, 178, 198.]

Petitioner erroneously assumes not only that the District Attorney actually made the out-of-court statements attributed to him but also that it is misconduct for an attorney to make an out-of-court statement. The fact is that in California there is no rule of professional conduct prohibiting attorneys from making out-of-court statements. (See 34 Calif. S. B. J. 859 [1959] for a proposal that there be such a rule in California.)

Whether attorneys for the defendants in the three cases actually made out-of-court statements about the cases to newspaper reporters is unknown to respondent. However, the newspaper exhibits before this Court contain no less than 69 reports of out-of-court statements purportedly made by counsel for defendants to newspaper reporters. See Appendix A. Typical of the comments reported are those set out in Appendix B.

Even if, contrary to the facts and the California law, this Court concluded (1) that out-of-court statements were made by attorneys on both sides and (2)

that the attorneys were guilty of misconduct in making the statements, it must be remembered that the proceedings in this Court are not for the purpose of disciplining attorneys by reversal of the judgments of the Supreme Court of California or by any other means. The sole question here is whether petitioner's conviction was had under circumstances depriving him of a fair trial.

It would unduly extend this brief if each of the articles purporting to quote the District Attorney was discussed in detail. Again respondent urges each member of this Court to read the articles and see whether he can conscientiously say that he would thereafter be unable to give petitioner a fair trial.

C. Assuming That Some Published Report Would Cause Every Reader to Become Legally Biased, There Is No Proof That Any Juror Who Served Read That Report.

Obviously nothing that occurred outside of the judicial proceedings and prior to the trial could possibly have affected petitioner's right to an impartial jury unless the event which occurred prevented at least one of the twelve jurors who served from trying the case fairly and impartially. Petitioner claims that published reports did so. Even assuming that one or more of the publications would have caused any reader to become legally biased, petitioner has not shown that any juror read those particular reports.

Those jurors who were asked by petitioner's counsel replied that they had either heard or read something about the case. However, petitioner's counsel did not ask any juror what he heard or read and did not even

ascertain the name of any newspaper which any juror might have read.

Between the date of the first newspaper exhibit (December 15, 1958) and petitioner's trial (April 6, 1959) there were 112 days. Yet the newspaper exhibits before the court in petitioner's case were the following number of issues of these respective papers:

Ventura Star-Free Press	14
Oxnard Press Courier	12
Los Angeles Examiner	1
Los Angeles Times	5
Los Angeles Herald Express	4

There was no showing that any juror read any issue of any of those newspapers. Respondent invites the Court's attention to the record containing the examination of the twelve jurors:

Berg [Tr. of R. pp. 95-97];
Bashor [Tr. of R. pp. 102-108];
Houle [Tr. of R. pp. 105-106];
Greer [Tr. of R. pp. 144-147];
Dodds [Tr. of R. pp. 177-179];
Dorner [Tr. of R. pp. 194-196];
Beesley [Tr. of R. pp. 97-99];
Tyrrell [Tr. of R. pp. 103-104];
Stearns [Tr. of R. pp. 143-144];
Jordon [Tr. of R. pp. 176-177];
Garrison [Tr. of R. pp. 182-183]; and
Clark [Tr. of R. pp. 198-200].

It is a well-known fact that most persons read newspapers only sketchily. Mr. Justice Frankfurter is quot-

ed as saying: "Very few people ever read anything except the headlines." Philips, Felix Frankfurter Reminisces, p. 169 (1960). Typical answers of jurors bear this out. For example, from Juror Stearns came this [Tr. of R. p. 143]:

> "Q. Have you read about this case? A. Not very much, sir."

From Juror Bashor [Tr. of R. p. 102]:

> "Q. Have you been following the progress of this case in the newspapers and over the radio? A. Well, I have part of it, not all of it. I've been too busy."

Even assuming that some particular report in one of the newspaper exhibits is deemed by this Court to be so damaging that anyone who read it would necessarily thereafter be unable to be fair to petitioner, the record is completely barren of any showing that any juror read the report.

The law in this situation is clear. In *People v. Chapman*, 93 Cal. App. 2d 365, 372, 209 P. 2d 121, 124 (1949), defendant claimed that a pre-trial newspaper article was so damaging that he could not be fairly tried in Alameda County. The appellate court rejected his claim with the observation that ". . . There is no evidence that any newspaper reports were read by any member of the jury. . . ." This court denied certiorari. *Chapman v. People*, 338 U. S. 943, 94 L. Ed. 581, 70 S. Ct. 423 (1950). In *People v. Cook*, 39 Cal. 2d 496, 499, 247 P. 2d 567, 568 (1952), defendant claimed "that prior to the trial the district attorney aroused the prejudice of the people against him

by making speeches about the case over the radio and at various civic meetings." Defendant's claim of lack of fair trial was rejected by the Supreme Court of California with the observation that "there is no evidence that any of the jurors who tried the case heard the speeches which were assertedly made."

If this Court believes that some particular article or articles would necessarily cause a reader to become legally biased against petitioner, respondent is at a loss to know how this Court can find that any juror read the offensive matter. The burden of showing this is on petitioner and he has not met it.

D. Assuming That at Least One Juror Became Legally Biased by What He Read, There Is No Proof That He Retained That Bias at the Time of Trial.

The newspaper articles in petitioner's case were published between December 15, 1958, and January 7, 1959. Petitioner's trial began three months after the last article was published. Even if this Court finds that one of those articles was so inflammatory that every reader would necessarily be influenced, consciously or unconsciously, to desire to impose the death penalty on petitioner and even if this Court finds (despite the complete absence of any showing in the record) that some juror read that article, the question still remains whether the juror retained that bias to the time of trial.

California recognizes that the fact that a whole community is aroused against a defendant by newspaper publications some time prior to trial is no proof that a fair and impartial jury cannot be obtained from that community at a later date. *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924), (offensive publication 17 days

before trial); *People v. Hall*, 220 Cal. 166, 30 P. 2d 23 (1934), (18 days); *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161 (1888), (three weeks); *People v. Suniga*, 128 Cal. App. 2d 738, 275 P. 2d 914 (1954), (three weeks); *People v. Mendes*, 35 Cal. 2d 537, 219 P. 2d 1 (1950), (three months); *People v. Burwell*, 44 Cal. 2d 16, 279 P. 2d 744 (1955), (four months).

E. Two California Courts Held That the Published Reports Would Not Make It Impossible to Obtain a Fair Jury.

Under California law the trial judge is required to grant a motion for change of venue if "a fair and impartial trial cannot be had in the county" where the case is pending. Cal. Penal Code, §§1033, 1035. Petitioner made such a motion on January 13, 1959, supported by the aforementioned newspaper exhibits. The motion was denied. [Tr. of R. p. 77.] The trial judge said:

> ". . . [A]fter carefully analyzing all of the material [the newspapers] submitted to me and after diligently and thoughtfully considering the entire case as far as it has developed up to the present time, I am unable to agree with counsel for defendants in their contention that the defendants cannot receive a fair and impartial trial in Ventura County.
>
> ". . .
>
> "If I had the slightest doubt in the world about the ability of the defendants to receive a fair trial in Ventura County I would without the slightest hesitation grant the motions for a change of venue."

The trial judge thus did not believe that all persons who read the newspapers and who would three months later become prospective jurors would be unable to give petitioner a fair trial. The Supreme Court of California was asked by petitioner to rule that the trial judge was wrong in this conclusion. Instead, that court affirmed the ruling of the trial judge denying the motion for change of venue. *People v. Baldonado,* 53 Cal. 2d 824, 350 P. 2d 115 (1960).

The California Supreme Court is well aware of the requirement that trial be had before impartial jurors. In *People v. McKay,* 37 Cal. 2d 792, 800, 236 P. 2d 145 (1951), the trial judge denied a motion for change of venue. Defendants' convictions by a jury were reversed by the Supreme Court for failure of the trial judge to order a change of venue. The court said:

> ". . . However conscientious the members of the jury might have been, it cannot reasonably be concluded that they could so divorce themselves from their past experiences and present surroundings that a fair and impartial trial could be had."

Eight California judges examined the newspapers now before this Court and not one found that the newspaper articles were such as to prevent prospective jurors from being fair. These views should be entitled to great weight in this Court.

F. Petitioner at the Trial Did Not Believe That Any Juror Was Legally Biased.

Sixty-one prospective jurors were examined in petitioner's case. This is not a large number for a capital case. Only 17 of those had formed opinions on the matter in issue, that is, what penalty should be applied

for the murder to which petitioner had pleaded guilty. Nine of these were found to have fixed opinions and they were all excused on challenges for cause by petitioner. The other eight prospective jurors said their opinions were not fixed and that they could fairly and impartially try the case. Nevertheless, most of these eight were excused on peremptory challenges by petitioner and the remainder were not challenged either for cause or peremptorily.

A ground of challenge to a juror is "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." Cal. Penal Code, §1073. Petitioner was well aware of this ground because he invoked it ten times. The trial judge sustained his challenge each time except as to prospective juror Openshaw [Tr. of R. p. 96] who was subsequently excused on a peremptory challenge. [Tr. of R. p. 135.] Not one person who ultimately served as a juror was challenged by petitioner for bias or any other reason. Certainly this is extremely strong evidence of petitioner's then belief that neither the newspaper articles nor anything else resulted in any juror who served being biased, partial or prejudiced.

A second indication of petitioner's attitude is his failure to move for a change of venue after the jury was selected. The trial judge expressly left that action open to him in denying his motion on January 15, 1959. [Tr. of R. p. 77.] If petitioner thought he could not get a fair trial because the jurors were biased, he would have then renewed his motion. That he did not do so

is strong evidence of the fact that there is no basis for his present charge that the jurors were biased. *Stroble v. California*, 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599 (1952).

Finally, petitioner in his motion for a new trial made no mention of any claim that he had been deprived of a fair trial by reason of the bias of the jurors due to newspaper publicity. [Tr. of R. pp. 79-83.]

G. Summary.

In *Stroble v. California*, 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599, 606 (1952), this Court was considering a California murder conviction which was preceded by intense newspaper publicity. Petitioner there had been described in the newspapers as a "werewolf", a "fiend" and a "sex-mad killer". His confession had been released by the District Attorney who also announced to the press his belief that petitioner was guilty. In finding that petitioner was not deprived of a fair trial, this Court said:

> ". . . Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury."

In the case at bar there is no affidavit that any juror was in fact prejudiced. The newspaper accounts of which petitioner complains were published almost four months before the beginning of petitioner's trial. No hostile acts or other facts were shown which indicated any community, as opposed to individual, prejudice. The victim was not a resident of the county of trial and all of the events concerning the plot to kill her took place in the neighboring county of Santa Barbara. Petitioner points to no statement of fact in any newspaper story which was not borne out by the evidence introduced at his trial. The publication of petitioner's confession, taken from the public records of the testimony before the grand jury, could in no event have harmed petitioner since he publicly, in open court before the trial, pleaded guilty to the crime.

In *United States v. Handy*, 351 U. S. 454, 100 L. Ed. 1331, 76 S. Ct. 965, 970 (1956), petitioner claimed he had been deprived of a fair trial by newspaper publicity. This Court said:

> ". . . [P]etitioner asks this Court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. . . . [W]e are asked to read the news reports and the testimony as to other incidents and to find, contrary to the Supreme Court of Pennsylvania and two federal courts, that these reports and incidents did create such an atmosphere that it infected the jurors and

deprived petitioner of a fair trial on the evidence presented to them. We see no justification in the record to warrant our so finding."

In the case at bar, all of the newspaper articles were presented to the trial judge three months *before* the trial and he decided that they would not necessarily prevent the selection of fair and impartial jurors. The record affirmatively shows that all of the jurors selected said they could and would be fair and impartial notwithstanding what they read and that petitioner believed them because he did not challenge a single one for cause nor did he thereafter move for a change of venue. The Supreme Court of California held that the newspaper accounts were not such as to have required the trial judge to have granted any motion for change of venue.

In order to reverse the judgment, this Court would have to do the following things:

1. Find that one or more of the newspaper articles were so inflammatory that every reader would be prejudiced against petitioner.

2. Find that at least one juror read the particular articles deemed to be offensive.

3. Find that the prejudice thereby engendered in that juror continued from the date of reading to the date of trial.

4. Find that the juror falsely stated under oath that he could and would give petitioner a fair trial.

5. Find that petitioner's failure to challenge any juror or to move for a change of venue after the selection of the jury is of no significance.

Respondent submits that there is nothing in the record which would support such findings.

Respondent does not claim that the publicity did not result in some prospective jurors becoming biased. It obviously did because nine prospective jurors admitted that they had fixed opinions. But respondent does claim that from the fact that some persons become biased, it does not follow that all others must necessarily be likewise biased. Not all persons are persuaded to identical conclusions by the same article or the same speech.

The newspaper publicity in the case at bar admittedly gave rise to the opportunity for some prospective jurors to reach fixed opinions as to what penalty petitioner should suffer. But as Mr. Justice Holmes, writing for this Court, stated in *Holt v. United States,* 218 U. S. 245, 251, 54 L. Ed. 1021, 1029, 31 S. Ct. 2, 6 (1910), ". . . If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

What was recently said in *Irvin v. Dowd,* 271 F. 2d 552, 554-555 (C. A. 7th Cir., 1959), certiorari granted 4 L. Ed. 2d 542 (1960), is appropriate:

> ". . . It is not surprising that, the more extensive the news coverage of a crime and the more wanton and unjustified the crime itself, the greater and more extensive is the indignation of citizens. Such indignation, varying in its degree according to the violence of the crime, and geographically extensive with the area of news distribution, undoubtedly causes many people to form im-

pressions or beliefs as to the guilt or innocence of suspected or indicted persons. In these days of widely effective and thorough news distributing instrumentalities, such as the telephone, newspaper, radio and television, as well as rapid travel of persons by automobiles, trains and airplanes, hardly a person anywhere in a state, or in fact in the United States, is long ignorant of the details of crimes committed in any state (or in this country), unless he be completely mentally incompetent or is in solitary confinement in a jail. In fact, it may well be that into the latter place the grapevine reaches. We no longer live in a day when what happened in the next county was learned only by conversation with a traveling man or a brakeman on the way freight train. It is into this modern society with facilities for quick and broad news coverage that a person who commits six murders projects himself. When apprehended, he is entitled to a fair trial and is to be accorded due process of law, according to the existing circumstances.

"Our problem in its last analysis is whether the general resentment of a people following the publication by news distributing media of information in regard to a series of murders may be relied upon to prevent the state from prosecuting a person indicted for these crimes, even though his trial be held before an unbiased judge and a jury is selected in accordance with established principles applicable to such a case. If the state is so prevented from trying such a person, it means that the commission within a state of a multiplicity of

criminal acts, followed by the usual publicity, actually immunizes the offender from prosecution. We reject such a conclusion as the law of this circuit."

It is of particular significance that in the present case nothing appeared in the newspapers that was not brought out during the trial. If the newspapers had published some particularly damaging facts about petitioner which either were not or could not have been introduced as evidence at the trial, the possibility of prejudice would have been increased. But here this Court must determine whether petitioner was deprived of a fair trial by pre-trial newspaper accounts of facts all of which (together with many more) the jurors ultimately heard from witnesses.

If such accounts are held to deprive an accused of a fair trial, then a large step in the indirect censorship of the press will have been taken. Public officers will conceal all information from the press (even though experience demonstrates that many crimes are solved and many wanted criminals are located through news items) for fear that publication of the information would jeopardize the ultimate trial of the accused. California will be forced to change its laws so that transcripts of preliminary examinations and grand jury hearings, which are now public records, will be made secret. (Even so, enterprising newspapers could nevertheless jeopardize a trial by printing information about a crime obtained from lay witnesses and other non-public sources.) Except for holding the newspaper in contempt of court, this Court will have for all practical purposes effectively forbidden the publication of

facts about the most interesting, significant and important criminal cases in this country. (Obviously, the minor, routine, unimportant cases get little or no publicity.)

It is no answer to say that where newspapers have given intensive publicity to a case, the trial should be delayed or moved to a different county. If the case is of widespread interest, the same publicity can be expected even though the trial takes place at a different time or place from that originally scheduled. (See Note, 63 Harvard L. Rev. 840 [1950].) Neither is it any answer to say that if the trial takes place as scheduled, a new trial should be granted. Again, it is naive to believe that similar publicity would not accompany the new trial.

When, as here, there is no editorializing, no demands for a particular result, no slanting of the news, no untrue statements, no publication of inadmissible facts and when, as here, the publicity does not result in any threat of violence, display of emotions or other conduct indicating an inflamed community, then the mere extensive news coverage should not be held to have deprived a defendant of a fair trial.

Finally, one important distinction should be noted between this case and cases arising from federal trial courts. In *Marshall v. United States,* 360 U. S. 310, 3 L. Ed. 2d 1250, 79 S. Ct. 1171 (1959), newspaper articles read by jurors during the trial were held to be so prejudicial that a new trial was granted by this Court. However, this Court acted in the exercise of its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts". It did not invoke the Due Process

Clause (of the V Amendment). While this Court undoubtedly would invoke the Due Process Clause (of the XIV Amendment) to reverse a state conviction if pre-trial publicity deprived a defendant of a fair trial, it has never done so. Respondent submits that there is less basis for doing so in the instant case than in other cases which have been before this Court.

II.

Was There a Violation of Petitioner's Right to a Fair Trial, as Guaranteed by the Due Process Clause of the XIV Amendment of the Constitution of the United States of America, Where in a Trial of a Capital Offense by Jury, the Trial Court Permitted to Remain in the Jury Box, and Sit in Judgment, Three Jurors Who Had Entered the Jury Box With Fixed Opinions as to Petitioner's Guilt, and Retained Such Opinions While Being Examined on Voir Dire?

Petitioner concedes in his brief that this "question certified for review does not involve this petitioner." Indeed, he could not do otherwise. No juror entered the box with a fixed opinion as to the penalty to be applied to petitioner, much less was any such person allowed to sit in judgment of petitioner. The fact that there is not, and could not be, any attack on the fairness and objectivity of even one juror emphasizes the lack of merit in petitioner's claim that he was denied a fair trial by pre-trial publicity. If, regardless of the pre-trial publicity, twelve fair and impartial jurors heard the case, how can petitioner claim that he did not get a fair trial because of something which happened long before the trial and did not affect the jurors who served?

III.

The Alleged "Failure of the State to Supply a 'Corrective Process'" Is Not an Issue Before This Court.

Petitioner, assuming that he could not get a fair trial because newspaper publicity was so prejudicial, quotes Mr. Justice Douglas as saying that the remedy in such a situation is "the granting of new trials, changes in venue or continuances." Respondent will discuss these in inverse order.

1. Continuance.

Petitioner, when his trial was originally set for February 16, 1959, asked for a continuance [Tr. of R. p. 6] but *not* on the ground that he could not obtain a fair trial. Although his request was denied [Tr. of R. p. 6], his trial was nevertheless later postponed until April 6, 1959. [Tr. of R. p. 23.] Petitioner did not object to the trial date, nor did he move for any continuance.

2. Change of Venue.

While petitioner moved for a change of venue on January 13, 1959, the denial of his motion was expressly made without prejudice to its renewal. [Tr. of R. p. 77.] He never renewed it.

3. New Trial.

While petitioner moved for a new trial, he did not assert as a ground for his motion that he could not or did not get a fair trial by the twelve jurors who heard his case. [Tr. of R. pp. 79-81.]

This Court must have recognized that petitioner is not now entitled to assert that California failed to sup-

ply a "corrective process" and that such failure was a denial of due process because this Court did not include this question in its order limiting the issues on certiorari. Petitioner's argument on this point is baseless and out of place.

Conclusion.

The facts concerning the murder of Olga Duncan were most unusual. It was therefore only natural that the case attracted world-wide attention through news media. Petitioner admitted his guilt of first degree murder and he has at no time questioned the sufficiency of the evidence to support the verdict decreeing that his penalty should be death.

This Court now asks whether petitioner was deprived of a fair trial. He obviously was not unless the publicity was such that one or more jurors had formed fixed opinions on the issue of penalty. The California Supreme Court put the matter succinctly:

> "Even if it be assumed that many persons formed opinions unfavorable to defendant as a result of what was published, it does not follow that persons without such views could not be found to act as jurors or that those who had adverse opinions would be unable to set them aside and try the case fairly on the basis of the evidence to be produced in court." *People v. Duncan,* 53 Cal. 2d 803, 812, 350 P. 2d 103, 108 (1960).

After examination of the jurors it was clear that there were nine who had formed no opinions whatever and that there were three who would be able to set

aside whatever opinions they had and decide the case solely on the evidence. Petitioner did not challenge a single one of the twelve jurors. He did not move for a change of venue after the twelve jurors were selected and before they were sworn. He did not at any time in the proceedings in the state courts claim that any one of the twelve jurors who actually tried the case was not fair and impartial.

Petitioner's motion for a change of venue, made almost three months before the twelve jurors were selected, can only be interpreted as a claim that all persons called as jurors who might say that they had no opinions actually would have fixed opinions adverse to petitioner and as a claim that all persons called as jurors who might say that they could and would set aside their opinions actually could not or would not be able to do so. These claims, made long before the trial began, that it would be impossible to find twelve impartial jurors were rejected by the trial judge when he denied petitioner's motion. They were rejected by the Supreme Court of California when it upheld the trial judge's ruling.

Respondent respectfully submits that there is nothing in the record which warrants this Court finding that the jurors who served were not fair and impartial despite their statements that they would be and despite petitioner's failure to challenge any one of them or to move for a change of venue after they had been ex-

amined. Nor is there anything in the record to warrant this Court finding that the trial judge and the Supreme Court of California were wrong in believing that petitioner did not demonstrate before the trial that it would be impossible to find in Ventura County twelve persons who could and would fairly and impartially try the case as jurors.

Respectfully submitted,

STANLEY MOSK,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

BRUCE A. THOMPSON,
District Attorney,
County of Ventura,
Attorneys for Respondent.

APPENDIX A.

Attorneys defending the three charged with the murder of Olga Duncan were: for Baldonado, John Danch; for Moya, Burt Henson; for Duncan, S. Ward Sullivan and Frank Duncan (the latter being formally made attorney of record on March 24, 1959). All are attorneys of record on this appeal.

For the convenience of this Court, the publications in this record in which it is reported that statements pertaining to the case were made out of court by attorneys for the defendants are here tabulated:

Date	Newspaper	Page	Exhibit	Attorney Quoted
22–1958	Ventura Star-Free Press	A-1	3	Sullivan
22	Los Angeles Times	25	30	Sullivan
22	Los Angeles Herald Express	A-4	10	Sullivan
23	Ventura Star-Free Press	A-1	16	Sullivan
23	Oxnard Press Courier	A-1	25	Sullivan
23	Los Angeles Times	1	31	Sullivan
24	Ventura Star-Free Press	A-1	17	Sullivan
24	Oxnard Press Courier	A-3	4	Sullivan
26	Oxnard Press Courier	A-1	26	Duncan
27	Ventura Star-Free Press	A-1	5	Duncan
27	Oxnard Press Courier	A-1	6	Duncan
27	Los Angeles Times	4	7	Duncan
29	Ventura Star-Free Press	A-1	9	Sullivan
29	Ventura Star-Free Press	A-1	9	Duncan
30	Ventura Star-Free Press	A-1	8	Sullivan
31	Ventura Star-Free Press	A-1	19	Danch
7–1959	Los Angeles Examiner	1	2	Sullivan
12	Ventura Star-Free Press	A-1	S-A p. 1	Duncan

Date	Newspaper	Page	Exhibit	Attorney Quoted
12	Ventura Star-Free Press A-1,	A-4	S-A p. 1	Sullivan
12	Ventura Star-Free Press	A-1	S-A p. 1	Henson
12	Ventura Star-Free Press	A-1	S-A p. 1	Danch
13	Ventura Star-Free Press	A-1	A-1	Sullivan
20	Ventura Star-Free Press	A-1	A-3	Henson
29	Oxnard Press Courier	A-1	S-A p. 1	Henson
29	Oxnard Press Courier	A-1	S-A p. 1	Danch
29	Ventura Star-Free Press	A-1	A-4	Sullivan
29	Ventura Star-Free Press	A-1	A-4	Henson
29	Ventura Star-Free Press	A-1	A-4	Danch
2– 2–1959	Ventura Star-Free Press	B-1	A-6	Sullivan
12	Oxnard Press Courier	A-1	S-A p. 8	Sullivan
12	Oxnard Press Courier	A-1	S-A p. 8	Danch
14	Ventura Star-Free Press	A-1	A-7	Sullivan
16	Ventura Star-Free Press	A-2	A-9	Danch
16	Santa Barbara News Press	A-1	A-63	Duncan
17	Ventura Star-Free Press	A-4	A-11	Sullivan
17	Ventura Star-Free Press	A-1	A-11	Duncan
18	Ventura Star-Free Press A-1,	A-3	A-40	Sullivan
19	Ventura Star-Free Press	B-8	A-12	Sullivan
20	Ventura Star-Free Press	A-1	A-13	Sullivan
21	Ventura Star-Free Press	A-1	A-41	Sullivan
24	Ventura Star-Free Press	B-1	A-14	Sullivan
26	Ventura Star-Free Press	A-16	A-16	Duncan
26	Ventura Star-Free Press	A-1	A-16	Sullivan
26	Santa Barbara News Press	A-1	A-19	Duncan

Date	Newspaper	Page	Exhibit	Attorney Quoted
26	Los Angeles Times	32	A-84	Sullivan
27	Ventura Star-Free Press	A-1	A-43	Duncan
27	Ventura Star-Free Press	A-1	A-43	Sullivan
27	Los Angeles Examiner	1	A-62	Danch
27	Los Angeles Examiner	1	A-62	Duncan
3- 2-1959	Santa Barbara News Press	A-7	A-69	Sullivan
3	Ventura Star-Free Press	A-1	A-46	Sullivan
4	Ventura Star-Free Press	A-1	A-23	Sullivan
6	Santa Barbara News Press	A-8	A-20	Duncan
9	Ventura Star-Free Press	A-1	A-49	Sullivan
9	Oxnard Press Courier	A-1	A-86	Sullivan
9	Santa Barbara News Press	A-1	A-72	Sullivan
11	Los Angeles Examiner	1	A-32	Sullivan
16	Santa Barbara News Press	A-1	A-76	Sullivan
17	Ventura Star-Free Press	A-1, A-7	A-37	Duncan
17	Ventura Star-Free Press	A-1	A-37	Sullivan
21	Ventura Star-Free Press	A-1	A-36	Duncan
21	Ventura Star-Free Press	A-1	A-36	Sullivan
21	Oxnard Press Courier	A-1	A-35	Duncan
21	Oxnard Press Courier	A-1	A-35	Sullivan
21	Santa Barbara News Press	A-6	A-80	Duncan
21	Santa Barbara News Press	A-6	A-80	Sullivan
21	Los Angeles Examiner	1	A-34	Duncan
21	Los Angeles Examiner	16	A-34	Sullivan
24	Ventura Star-Free Press	A-1	A-59	Sullivan

APPENDIX "B".

The nature of the reported statements by defense attorneys to newspapers is illustrated by the following excerpts:

"Frank later rapped what he called the political ambitions of the district attorney. 'There was no question that there was political ambition in this,' he said. 'He intends to climb to some higher position over my mother's body.' "

(p. A-1 Ventura Star-Free Press March 21, 1959, Ex. A-36.)

"Frank Duncan was barred yesterday from seeing his mother, Mrs. Elizabeth Duncan, now in county jail awaiting trial. . . .

"Duncan was visibly disappointed and angered by the refusal. He termed it 'extraordinary' and said it was 'uncalled for'. 'There is no justification for it,' he added. 'It smacks of the thumb and the screw—I mean, the rack and the screw.'

"Sullivan told newsmen that the bar to outside visitors would hamper preparation of his case. . . .

"He said he saw the 'handwriting' of District Attorney Roy A. Gustafson behind [Sheriff] Hill's orders yesterday. . . .

"[Duncan] said he had not read anything in any newspaper since last seeing his mother on December 20—six days before she was indicted in the slaying plot . . . to change his opinion of her innocence.

" 'Just because she is accused does not mean she is guilty,' he said. . . .

"Sullivan and Duncan also revealed yesterday that shortly after the 31-year old attorney was born, his mother was in a sanitarium."

(p. A-1, Ventura Star-Free Press, January 12, 1959, Sullivan, Ex. A p. 1.)

"Defense Counsel Sullivan reported he was somewhat startled, when going into the jail to visit his client, to hear the jailer call out the name of a prisoner. 'Gustafson,' the jailer called. 'Gustafson, come here.'

"Sullivan stopped and said: 'Would you mind telling me the first name of that fellow?'

"No, it wasn't Roy A."

(p. B-1 Ventura Star-Free Press, February 24, 1959, Ex. A-14.)

"Frank Duncan leveled this blast at Gustafson: 'There is no question but that he intends to climb to some higher political position over the body of my mother! Never, as a lawyer, did I think I would see such hatred, bias and prejudice in any court in the United States.' "

(p. A-6 Santa Barbara News Press, March 31, 1959, Ex. A-80.)

"Her son Frank .... told the News Press this morning he is sure that the woman charged with killing his young wife is innocent.

" 'After I read the complete Grand Jury transcript,' he said, 'I am fully convinced that my mother is innocent of the charge.' He also said he has 'the greatest concern' that she will not get a fair trial in Ven-

tura County, based on wide publicity given events which have gone before."

(p. A-1 Santa Barbara News Press, February 16, 1959, Ex. A-63.)

"District Attorney Roy Gustafson was accused of 'going a long way' to prejudice any jury that would hear the Duncan murder case.

"The accusation came from Mrs. Elizabeth Duncan's defense attorney, S. Ward Sullivan, who charged that Gustafson's public statements . . . using this case as an argument in favor of capital punishment are a very obvious effort to influence a verdict.

" 'His remarks,' Sullivan said, 'certainly will influence potential jurors in Ventura County. Gustafson is going a long way to see that these defendants do not receive a fair and impartial trial at the hands of an unbiased and unprejudiced jury.' "

(p. A-1 Ventura Star-Free Press, December 30, 1958, Ex. 8.)

"The following statement was handed to reporters by attorney Burt Henson this morning . . . 'One thing that troubles me about this case is the fact that the district attorney appears to be following a course of selective prosecution and selective retribution. It appears as though the district attorney is again deciding who is to be prosecuted and who shall be a target of retribution.' "

(p. A-1 Ventura Star-Free Press, January 29, 1959, Ex. A-4.)

"Mr. Sullivan told the Press Courier just before court convened today that the district attorney has been guil-

ty of prejudicial conduct 'in offering what he knew or should have known was incompetent and irrelevent [*sic*] evidence, entered for the purpose of degrading and debasing my client in the eyes of the jury.'"

(p. A-1 Oxnard Press Courier, March 9, 1959, Ex. A-86.)

"Sullivan who talked for two hours to Mrs. Elizabeth Ann Duncan, 54, today, said tonight:

"'I firmly belief that these two men maintained a bitter grudge toward the Duncan family and they resorted to murder in an attempt to blackmail this poor woman.'"

(p. 1, Los Angeles Times, December 23, 1958, Ex. 31.)

"Sullivan emerged from an hour and a half conference with Mrs. Duncan this afternoon to announce that he is convinced she is not guilty and that he will so plead her.

"He said he is convinced she had nothing to do with her daughter-in-law's disappearance and demise, but that he forsees [*sic*] a long trial, possibly two or three weeks."

(p. A-4 Los Angeles Herald Express, December 22, 1958, Ex. 10.)

"Duncan said . . . 'It's inconceivable that mother could associate with a man like that. It sounded like something that might be done in Chicago—not in Santa Barbara.

"'What a cold-blooded man (Moya). I'd like to lay my hands on that——————————.'"

(p. 1 Los Angeles Examiner, February 27, 1959, Ex. A-62.)

"Sullivan said it appeared to him that Gustafson had done 'a good job in educating the people of Ventura County on his views of capital punishment.'"

(p. A-1 Ventura Star-Free Press, February 18, 1959, Ex. A-40.)

"Said Sullivan: 'This is the clearest case of a miscarriage of justice that I have ever tried in my more than 30 years as a trial lawyer. There is more glaring error in this record than in any case I have ever tried.' . . .

"Of his client he said, 'I don't think she comprehends what happened. All she knows is that she was tried before a biased and prejudicial jury.'"

(p. A-1 Ventura Star-Free Press, March 21, 1959, Ex. A-36.)

"Frank Duncan said he had been reared very carefully by his mother. 'She taught me always to stick up for the under dog, not to hurt anyone, particularly the helpless. She was a very sensitive person—she couldn't stand to see a chicken killed,' he said."

(p. A-1 Ventura Star-Free Press, December 27, 1958, Ex. 5.)

"S. Sullivan, prominent Los Angeles attorney, disclosed that Mrs. Duncan's defense will probably be that she was being blackmailed by Baldonado and Moya."

(p. A-1 Oxnard Press Courier, December 23, 1958, Ex. 25.)

"S. Ward Sullivan, Mrs. Duncan's attorney, said he would 'just as soon' have both Baldonado and Moya plead guilty.

"'We would prefer to go to trial without those two,' Sullivan said."

(p. A-1 Ventura Star-Free Press, January 29, 1959, Ex. A-4.)

"Frank Duncan had bitter comments after court about Moya's conversion. 'He claims to have religion now, yet he told about killing my wife with no more emotion than if he were ordering his lunch,' Frank said.

"He had said earlier it was inconceivable his mother could associate with a man like that."

(p. A-1 Ventura Star-Free Press, February 27, 1959, Ex. A-43.)

"Sullivan said he regards the Duncan case as one of the most interesting he has handled.

"He said his client has consistently stated to him that she is innocent. The main difficulty from a defense standpoint that he sees right now is in impaneling an impartial jury to try her.

"'He feels statements by the District Attorney have seriously prejudiced the average Ventura County citizen against Mrs. Duncan."

(p. B-1 Ventura Star-Free Press, February 2, 1959, Ex. A-6.)

"Young Duncan greeted his mother again in the courtroom and took the opportunity to make several statements to the press. He said for one thing his mother, and other women prisoners in the county jail, are not allowed to read Ventura County newspapers on the belief they would obtain information concerning developments in cases in which they are involved.

"He also branded as 'hogwash' reports that his mother is accumulating a cache of sleeping pills and other drugs in her jail cell as a possible suicide preparation in case the murder trial goes against her."

(p. A-1 Ventura Star-Free Press, February 17, 1959, Ex. A-11.)

"Frank Duncan told reporters after the session that he did not learn of the phony annulment until many weeks after it was granted."

(p. A-16 Ventura Star-Free Press, February 26, 1959, Ex. A-16.)

"S. Ward Sullivan, vetgran criminal lawyer, said today he will enter a plea of 'not guilty' for Mrs. Elizabeth Duncan . . . 'She denies having any part of the killing of Olga Duncan,' Sullivan said.

"He said she admitted having met both Augustine Baldonado and Luis Moya who are believed to have committed the actual killing. . . .

"Sullivan said that 'she feels someone else is trying to involve her in the murder.' . . .

"Asked what the feeling was between the two women, the son's wife and the mother-in-law, Sullivan said that there was no indication of hatred on the part of Mrs. Duncan. 'She has told me however, that there was no love lost between them."

(p. A-1 Ventura Star-Free Press, December 22, 1958, Ex. 3.)

"The Los Angeles attorney said there are a great number of facts in the matter which have not as yet been presented and which he feels will place a new light on the whole proceedings. . . .

"Sullivan said his client is maintaining a calm attitude outwardly but that she has obviously been hard-hit by the aspects of the charges against her. 'She has lost 12 pounds since being placed in custody.' Sullivan said. 'She would, of course, rather be spending her holiday season with her son and friends than in jail.'"

(p. A-1 Ventura Star-Free Press, December 24, 1958, Ex. 17.)

"Sullivan has told reporters one of his arguments will be that all of the testimony against Mrs. Duncan is from people who were admitted accomplices in the crime of murder, and that the law requires independent, corroborative evidence from people who were not directly involved."

(p. A-1 Ventura Star-Free Press, February 27, 1959, Ex. A-43.)

"Sullivan contends all who have testified to details of the alleged murder scheme up to now have branded themselves accomplices by their own testimony."

(p. A-1 Ventura Star-Free Press, March 3, 1959, Ex. A-46.)

"Earlier, Mrs. Duncan's attorney, S. Ward Sullivan, said he will demand a mistrial in the four-week-old trial, citing what he called 'misconduct of the district attorney.' . . . '[H]e knows the jury cannot exclude these matters from their minds,' Sullivan said."

(p. A-1 Ventura Star-Free Press, March 9, 1959, Ex. A-49.)

"Young Duncan refused to say what he thought about his mother's involvement. . . .

"'My mother would have to be insane to be linked into this . . .' he said."

(p. A-1 Oxnard Press Courier, December 26, 1958, Ex. 26.)

"Sullivan said later he had talked to her [Mrs. Duncan] about the verdict. . . .

"'She isn't surprised at the verdict,' he said, 'because she realizes she had to go to trial before a jury that was already biased and prejudiced, and she couldn't expect anything else from the outset of the trial.'"

(p. A-6 Santa Barbara News Press, March 21, 1959, Ex. A-80.)

"John Danch, Ventura attorney for Baldonado, said he expects the trial to take at least two weeks. He hopes the three defendants will be tried together, but anticipates Mrs. Elizabeth Duncan's attorney, S. Ward Sullivan, may seek a separate trial for his client.

"Danch says he feels it may be difficult to obtain an impartial jury in Ventura County."

(p. A-1 Ventura Star-Free Press, December 31, 1958, Ex. 19.)

"Sullivan said today Mrs. Duncan definitely will take the stand to testify in her own behalf, when the defense presents its case. Under the law, she cannot be required to do so."

(p. A-1 Ventura Star-Free Press, February 26, 1959, Ex. A-16.)

"Baldonado's attorney, John Danch, Ventura, said he plans to advise the former Camarillo resident against making any admissions in the Duncan trial starting today."

(p. A-2 Ventura Star-Free Press, February 16, 1959, Ex. A-9.)